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No. 08-855

In The

Supreme Court of the United States

CLIFFORD CHARLES FOWLER,

Petitioner,

v.

LARRY CRAWFORD, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Eighth Circuit

PETITIONER'S REPLY MEMORANDUM

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INTRODUCTORY REMARKS

Before addressing the substantive issues raised in Respondents' opposing brief, Petitioner must digress to correct certain misstatements regarding the record below. Respondents contend the Eighth Circuit's opinion in this case held the Missouri Department of Correction's ("MDOC") sweat-lodge policy satisfied RLUIPA, in part, because MDOC attempted to provide a sweat lodge at another maximum-security prison, but was unsuccessful in its efforts. This misstates conceded issues of fact. MDOC conceded it operated a sweat lodge for 13 years without incident at a maximum-security facility. (Roper Dep. pp. 15, 43, 47-48) (JA-66, 69, 70). MDOC acknowledged that the policy change leading to the statewide sweat-lodge ban resulted from a stabbing incident having nothing to do with any religious accommodation, much less the operation of a sweat lodge. (Roper Dep. pp. 41-43, 56-58) (Moore Dep. p. 13) (Long Dep. p. 25) (JA-26, 51, 69, 71).[1] Respondents' representation that the Eighth Circuit viewed their successful operation of a sweat lodge at a maximum-security facility as evidence that MDOC satisfied RLUIPA is therefore incorrect.

Substantively, Respondents raise two arguments in their opposing brief: (1) Fowler's

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[1] As the Eighth Circuit stated: "Notably, MDOC's Potosi Correctional Center (PCC) at one time authorized a by-yearly sweat lodge ceremony only to discontinue it later. . . Donald Roper, PCC's Superintendent, stated that PCC discontinued operating the sweat lodge in 2006 due to increasing security concerns amidst a guard stabbing at the prison." App. at 10.

RLUIPA claim is moot because he has been transferred to a new facility, and (2) the divergent circuit court interpretations of RLUIPA's strict-scrutiny standard are simply semantical differences without substantive import. As explained herein, both arguments are inaccurate. Moreover, Respondents' mootness argument elucidates another circuit split in need of resolution: whether money damages are available under RLUIPA.

DISCUSSION

I. Fowler's RLUIPA Claim Is Not Moot.

A. Petitioner Fowler Is Still Subject to the Same Challenged Policy.

As Respondents point out, MDOC transferred Fowler to a new facility—Algoa Correctional Center ("ACC")—during the pendency of this appeal. However, this does not make Fowler's RLUIPA claim moot. Transfer of an inmate moots his challenge to a prison policy or condition only where he is transferred to a different location and "is no longer subject to the challenged policy, practice, or condition[.]" *Incumaa v. Ozmint*, 507 F.3d 281, 286-7 (4th Cir. 2007); *Smith v. Hundley*, 190 F.3d 852, 855 (8th Cir. 1999). Here, Petitioner Fowler has been transferred from Jefferson City Correctional Center ("JCCC") to ACC—another MDOC facility. As the Petitioner's Brief makes clear, MDOC has banned sweat lodges at all of its facilities—including ACC. As Petitioner Fowler is subject to the same challenged policy, his RLUIPA claim is not moot. *See Smith v. Allen*, 502 F.3d 1255, 1267 (11th Cir. 2007) (Inmate's RLUIPA claim was not moot where he had

been reincarcerated and was subject to the same offending policy). *See also U.S. v. Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (Case not moot where allegedly wrongful behavior could be reasonably expected to recur).

B. Petitioner Fowler Seeks All Relief Available, Including Money Damages, Under RLUIPA; There Is a Circuit Split Over Whether RLUIPA Permits Money Damages.

At the outset of the underlying litigation, Petitioner Fowler filed a Complaint against the Defendant/Respondents, alleging in relevant part the RLUIPA violation at issue here. In connection with that claim, Petitioner Fowler prayed for judgment "for injunctive and declaratory relief; for punitive damages sufficient and necessary to punish the Defendants and to deter others from like actions; for attorneys' fees, costs, and disbursements as allowed for under 42 U.S.C. § 1988; and for such other and further relief as the Court deems just and equitable." (First Amended Complaint, at WHEREFORE clause following ¶ 51). Thus, Petitioner Fowler states a claim for appropriate relief under RLUIPA, including money damages. Because such claim includes one for monetary relief, it is not mooted by Fowler's transfer. Moreover, it highlights another critical circuit split this Court must resolve.

By its text, RLUIPA provides that a prevailing party may "obtain *appropriate relief* against a government." 42 U.S.C. § 2000cc-2(a) (emphasis added). However, the question of whether "appropriate relief" includes money damages is still

unanswered. "To put it mildly, 'there is a division of authority' on this question." *Allen*, 502 F.3d at 1270 (quoting *Madison v. Virginia*, 474 F.3d 118, 130 n. 3 (4th Cir. 2006)). Some courts believe the Eleventh Amendment—governing sovereign immunity—precludes recovery of money damages. However, other courts hold otherwise, finding the acceptance of federal funding constitutes waiver of the Eleventh Amendment for purposes of RLUIPA.

The Eleventh Circuit has concluded that the Eleventh Amendment does not bar claims for monetary damages under RLUIPA. *Allen*, 502 F.3d 125. In *Allen*, the Eleventh Circuit held:

> [I]n *Benning*, we held that section 3 of RLUIPA effectuated a clear waiver of the state's sovereign immunity under the Eleventh Amendment. We held that RLUIPA's statutory language, conditioning the receipt of federal funds on adherence to the statute and providing that a plaintiff may seek "appropriate relief" when the statute is violated, made clear that "by accepting federal funds, [the state] waived its immunity under RLUIPA," and found that "Congress unambiguously required states to waive their sovereign immunity from suits filed by prisoners to enforce RLUIPA." In light of that holding, **we conclude that the Eleventh Amendment will not shield the state (and its agents) from an official capacity action for damages under RLUIPA.**

Id. at 1276 (emphasis added) (internal citations omitted). Thus, according to the Eleventh Circuit, money damages may be awarded against a state and/or a state official under RLUIPA. Numerous district courts have reached similar opinions. *See, e.g.*, *Allen*, 502 F.3d at 1270 (citing *Shidler v. Moore*, 409 F.Supp.2d 1060, 1067 (N.D. Ind. 2006); *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*, 326 F.Supp.2d 1140, 1161-62 (E.D. Cal. 2003); *Chase v. City of Portsmouth*, No. 2:05CV446, 2005 WL 3079065, at *5 (E.D. Va. Nov. 16, 2005); *Presley v. Edwards*, No. 2:04-CV-729-WKW, 2007 WL 174153, at *13 (M.D. Ala. Jan. 19, 2007); *Gooden v. Crain*, 405 F.Supp.2d 714, 723-24 (E.D. Tex. 2005); *Charles v. Verhagen*, 220 F.Supp.2d 937, 938-39 (W.D. Wis. 2002)).

In contrast to the Eleventh Circuit, the Fourth Circuit Court of Appeals and some other federal courts hold that RLUIPA does not permit money damages against a government or its officials. *See, e.g.*, *Madison v. Virginia*, 474 F.3d 118, 132 (4th Cir. 2006); *see also Allen*, 502 F.3d at 1270 (citing *Boles v. Neet*, 402 F.Supp.2d 1237, 1241 (D. Colo. 2005); *Decker v. Ferrero*, 475 F.Supp.2d 1325, 1337 (N.D. Ga. 2007)). Thus, in *Madison*, the Fourth Circuit held: "RLUIPA's 'appropriate relief against a government' language falls short of the unequivocal textual expression necessary to waive State immunity from suits for damages." 474 F.3d at 131 (citing *U.S. v. Nordic Village, Inc.*, 503 U.S. 30, 39 (1992)). Specifically, the Fourth Circuit stated: "Had Congress wished to effect a State's waiver of Eleventh Amendment sovereign immunity from suit for damages as a consequence of accepting federal

funds, it could easily have expressed that intention." *Id.* at 132.

The circuit split evident by the Eleventh and Fourth Circuit decisions is significant in that it subjects inmates to varying potential recoveries depending solely on the circuit in which they assert their RLUIPA claims. To the extent RLUIPA permits money damages, Petitioner Fowler's money damage claim is not moot and will not be moot even if he is released from prison. *See, e.g.*, *Church of Scientology of Cal. v. U.S.*, 506 U.S. 9, 13 (1992) ("The availability of [a] possible remedy is sufficient to prevent this case from being moot."). The Court should, therefore, resolve the dispute.

II. The Eighth Circuit Reads RLUIPA to Require Rational-Basis Review; All Other Circuits Require Strict-Scrutiny Analysis.

Respondents' argument denying a circuit split with respect to RLUIPA's strict-scrutiny standard misconstrues the Eighth Circuit's opinion in this case. The circuit split at issue relates to a heavily-litigated statute affecting the free-exercise rights of millions of citizens and is not, as Respondents contend, merely a difference in semantics. The Eighth Circuit's interpretation of RLUIPA's least-restrictive means requirement relieves the government of considering and ruling out less-restrictive alternatives to the actual religious exercise being affected so long as the affected inmate has some "other means" to practice his or her faith, irrespective of whether the "other means" is a spiritual substitute for the religious exercise affected by the policy at issue. The Eighth Circuit's holding

that the governmental policy under review satisfies RLUIPA at summary judgment so long as "other means" exist for the adherent to practice his religion in general transforms RLUIPA's text into *Turner's* rational-basis formulation. *Turner v. Safley*, 482 U.S. 78, 89-90 (1987) (balancing whether "alternative means of exercising the [religious] right . . . remain open to prison inmates"). Eroding a central protection conferred under RLUIPA is not an issue of mere semantics.

Indeed, the Ninth Circuit's analysis of RLUIPA in *Greene v. Solano County Jail* accentuates the structural flaw in the Eighth Circuit's interpretation of RLUIPA. 513 F.3d 982, 989 (9th Cir. 2008). *Greene* addressed whether a prohibition against group worship in a maximum-security prison was permissible under RLUIPA. In *Greene*, the state advocated the same reading of RLUIPA that the Eighth Circuit adopted in this case: because the "religious exercise" subject to strict scrutiny under RLUIPA was, broadly, Greene's ability to practice Christianity, not the group-worship policy Mr. Greene challenged (i.e., in this case, Fowler's Native American faith, not the sweat-lodge prohibition), and because Greene had other avenues available to practice his faith, the subject policy satisfied RLUIPA. *Id.* at 987-99. The Ninth Circuit rejected this reading of RLUIPA because the relevant religious exercise being challenged was group worship, and not more generally whether Mr. Greene had some avenues to practice Christianity. *Id.* Whether, apart from group worship, "alternative means for exercising [Greene's] religion remained available to [him]" was irrelevant to whether the government satisfied strict scrutiny, which required

demonstrating what less-restrictive alternatives it had considered to *the group-worship ban*. *Id.* at 987. The Eighth Circuit, however, adopted the exact interpretation of RLUIPA the Ninth Circuit rejected in *Greene*: because MDOC offered Fowler some alternatives to practice his Native American faith (albeit ones that require him to violate tenets of his faith), MDOC passed strict scrutiny, notwithstanding its failure to consider less-restrictive alternatives to a blanket sweat-lodge prohibition. This is a clear circuit split this Court must resolve as various circuits read RLUIPA to provide different levels of constitutional scrutiny.

CONCLUSION

This case implicates two circuit splits relating to the proper interpretation of RLUIPA: (1) whether RLUIPA's strict-scrutiny standard is the legal equivalent of the *Turner* test, a form of rational-basis review, and (2) whether RLUIPA permits a claim for money damages. The Court should grant Fowler's petition for certiorari and clarify the proper interpretation of RLUIPA on these issues.

Respectfully submitted,

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